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Vol. I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 17

T. A. MORRISSEY AND JAMES M. O'BRIEN, TRUSTEES OF AN EXPRESS TRUST KNOWN AS WESTERN AVENUE GOLF CLUB, PETITIONERS,

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 1, 1935.

CERTIORARI GRANTED MAY 13, 1935.

SUPREME COURT OF THE UNITED STATES

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VOL. I.

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APPEARANCES.

For Taxpayer:
THEODORE B. BENSON, ESQ.,
JAMES C. O'BRIEN, ESQ.,

For Comm'r.:
J. M. LEINENKUGEL, ESQ.,

DOCKET ENTRIES.

1928

Oct. 11—Petition received and filed. Taxpayer notified. (Fee paid)

" 12—Copy of petition served on General Counsel.

Nov. 30—Answer filed by General Counsel.

Dec. 1—Copy of answer served on taxpayer. General Calendar.

1929

Oct. 17—Motion to consolidate for hearing on Oct. 23, 1929 with docket 34[illegible]led by taxpayer.

" 17—Motion to leave to amend petition embodying amendment filed by taxpayer. 10/21/29 granted.

" 21—Motion to withdraw motion to consolidate filed by taxpayer. 10/21/29 granted.

" 23—Copy of motion and amendment served on General Counsel.

Dec. 19—Answer to amendments to petition filed by General Counsel. 12/20/29 copy served.

1930

Jan. 14—Hearing set 3/6/30.

Mar. 3—Motion to consolidate with 34287 for hearing filed by General Counsel. See 34287—no action.

" 5—Motion to consolidate with 34287 for hearing and place on Reserve Calendar filed by taxpayer.

" 6—Motion granted.

May 11—Motion to continue to Circuit Calendar for hearing in Los Angeles and consolidate with 34287 filed by taxpayer. 5/6/31 granted to Circuit Hearing.

1932

Apr. 14—Hearing set for June 6, 1932 in Los Angeles, California.

Jun. 6-10—Hearing had before Mr. Smith, Div. 5 on the merits. Submitted. Amended answer allowed—served—30 days for reply stipulation of facts filed at hearing—briefs due in 60 days.

Jul. 7—Motion for extension of 15 days to file reply to amended answer filed by taxpayer. 7/18/32 granted.

Aug. 4—Motion for extension to Oct. 9, 1932 to to file brief filed by General Counsel. 8/5/32 granted both sides.

Oct. 6—Motion for extension of 60 days to file brief filed by General Counsel. 10/7/32 granted to 12/1/32 to both sides.

Nov. 4—Brief filed by General Counsel.

Dec. 5—Transcript of hearing of Jun 10, 1932 filed. [1*]

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

1933

Jan. 12—Proposed findings of fact and brief filed by taxpayer.

Mar. 24—Memorandum opinion rendered, Mr. Smith, Div. 5. Judgment will be entered under Rule 50.

May 24—Notice of settlement filed by General Counsel.

" 27—Hearing set June 21, 1933 on settlement.

Jun. 21—Hearing had before Mr. Van Fossan on settlement. Referred to Mr. Smith for decision.

" 23—Decision entered, Charles P. Smith, Div. 5.

Sep. 23—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by taxpayer.

" 23—Proof of service filed by taxpayer.

Nov. 16—Praecipe filed. Proof of service thereon.

" 21—Order enlarging time to Dec. 30, 1933 to file certified copies of record papers sur petition for review entered. [2]

VOL. I

The United States Board of Tax Appeals

Docket No. 40977

T, A. MORRISSEY and JAMES M. O'BRIEN, Trustees of an Express Trust, known as Western Avenue Golf Club,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency IT:AR:A-5-NMP dated August 20, 1928, and as a basis of their proceedings allege as follows:

1. The petitioners are trustees of an express trust known as Western Avenue Golf Club with the principal place of business at 824 Van Nuys Building, City of Los Angeles, State of California.

2. The notice of deficiency (a copy of which is attached hereto, made a part hereof and marked Exhibit "A") was mailed by the Commissioner of Internal Revenue August 20, 1928, and alleges a deficiency for the years 1924 to 1926, inclusive, in the amount of $8,518.12. [3]

3. The tax in controversy is the income tax for the calendar years 1924 to 1926, inclusive, and the

amount thereof is less than $10,000.00, to wit: $8,518.12.

4. The determination of tax set forth in the said notice of deficiency is based on the following errors:

(a) The Commissioner of Internal Revenue erroneously determined that the declaration of trust under which the petitioners are trustees created an "association" within the meaning of Section 2 of the Revenue Acts of 1924 and 1926, and as a result thereof the said Commissioner determined the net income and computed the tax in the manner and at the rates set forth in Part II of the said Revenue Acts, whereas in law and fact the declaration of trust did not create such an "association" but appointed the petitioners trustees of a "trust" within the meaning of Section 219 of said Revenue Acts of 1921 and 1924, the net income of which should be determined and the tax computed as prescribed in Part I of said Revenue Acts. The petitioners specifically assign error in the determination of net income based on the action of the said Commissioner in including therein the amount distributed by the petitioners to beneficiaries of the Trust.

(b) The Commissioner of Internal Revenue erroneously determined that all sales made by the petitioners during the years 1921, 1922, and 1923 were on the basis of installment sales, whereas certain sales were for cash and were not on [4] the installment plan within the meaning of Section 212(d) of the Revenue Act of 1926 and no part f the collections made on such sales should be included in income for the years 1924 to 1926, inclusive.

(c) In his determination of the percentage of profit on the sale of real estate on installment contracts the Commissioner of Internal Revenue erroneously failed to consider commissions paid to selling agents and other selling expenses. The said Commissioner determined that such commissions and expenses paid in 1921, 1922 and 1923 were ordinary and necessary expenses of doing business for the years in which paid, whereas such commissions and expenses were not ordinary and necessary expenses of doing business for such years but are to be deducted from gross sales price in determining the net profit realized and to be used as the basis for determining the percentage of profit.

(d) In addition to the above assignments of error and as an independent and affirmative allegation, the petitioners allege that the said declaration of trust in so far as it provides that income shall be held and accumulated is in contravention of the laws of the State of California, and that the law required the petitioners to make immediate distribution of all income received and they should have filed fiduciary returns only on behalf of the Trust and not returns of income. The petitioners are therefore not subject to tax but are merely required to file an information return disclosing the amounts distributed to and taxable to the beneficiaries.

5. The facts upon which the petitioners rely as the basis [5] of their proceedings are as follows:

(a) On October 4, 1921, T. A. Morrissey and James M. O'Brien executed a Declaration of Trust

as to certain real estate in the city of Los Angeles. In the Declaration of Trust the said Morrissey and O'Brien declared themselves trustees to collect, hold and distribute the net income of the Trust for the benefit of the beneficiaries whose beneficial interests are represented by certificates of shares. The petitioners filed returns for the Trust as required by Section 219 of the Revenue Acts of 1924 and 1926 and determined the tax as prescribed in Part I of said Acts. The Commissioner of Internal Revenue determined that the Declaration of Trust created an association within the meaning of Section 2 of the said Acts and determined the income and computed the tax as those of a corporation are to be determined and computed under Part II of said Acts.

The declaration of trust recites that certain property had been conveyed to the trustees. This property consisted of 155 acres of land. During the years of 1921 and 1922 the trustees sold beneficial interests in the trust. About 42 acres were surveyed into lots and the sale thereof was begun December 20, 1921 through a broker and his salesmen. The subdivided property was improved by the construction of streets, walks, and curbs during the year 1922. All collections of installments on sales contracts were made through the collection department of a bank. On that part of the property not subdivided a golf course was constructed and completed in September 1922 and a club house in connection therewith was completed in December 1922, which were used by members of the club and their

guests until January 12, 1924. [6] Each beneficiary in the trust received a free membership entitling him to club privileges on payment of the regular fees, and later a few memberships without beneficial interests were sold under a plan requiring refund (less a small monthly amortization, the equivalent of dues) in case of discontinuance of the club activities, which net refunds were paid a short time after the club activities ceased. The club was private and privileges were available only to members and their guests and not to the public generally. No dues were charged, but all persons using the golf course were required to pay a fixed greens fee. The dining room and golf supplies department were operated by concessionaires on a percentage basis. In 1923 a subsidiary corporation was formed and took title to the 113 acres which had not been subdivided and gave back a lease thereon. In November 1923 the property was sold and possession was surrendered on January 12, 1924, at which time it was invested in liquid form to enable quick liquidation and to provide dividends pending dissolution, which would have taken place immediately had it not been for the necessity for the sale of the repurchased improvements and for this tax proceeding. No other activities of any kind were at any time engaged in by the petitioners nor by anyone else on behalf of the Trust.

During the years 1924, 1925 and 1926, and pursuant to the terms of the Declaration of Trust, the petitioners made distributions to the beneficiaries in the respective amounts of $856,828.77, $820,-

648.00 and $817,511.10 on which the [7] beneficiaries paid income tax. These amounts were deducted from income by the petitioners on the returns filed pursuant to said Section 219. The Commissioner of Internal Revenue, having treated the Trust as a corporation, considered the amounts distributed the equivalent of the payment of dividends and denied the same as deductions from income.

(b) The Commissioner of Internal Revenue determined that all sales made during the years 1921, 1922, and 1923 were installment sales within the meaning of Section 212(d) of the Revenue Act of 1926, and included in income for the years 1924, 1925 and 1926 a percentage of profit on collections on such sales. Certain sales made during the years 1921, 1922 and 1923 respectively, the gross sales prices of which were $1,850, $82,705, and $2,125 were not on the basis of installments as defined in said Section 212(d) but were for cash.

(c) During the years 1921, 1922 and 1923 the petitioners paid the sums of $7,272.40, $34,876.09 and $416.05 respectively, representing the commissions of agents and other expenses in connection with the sales of real estate. The Commissioner of Internal Revenue considered these expenditures ordinary and necessary expenses of doing business an deducted the amounts thereof from income for each of the said years and as the result of this he determined that the percentage of profit on sales for the years, 1921, 1922 and 1923 was 50.405%. The percentage determined on the basis of treating the commissions and selling expenses as reductions

to sales price is 35.593% of gross sales. This percentage is determined on the basis of the following: [8]

Gross Sales	$287,365.00	
Less Commissions etc.	42,564.54	
Net Sales Price		$244,800.45
Cost of Land	$100,968.61	
Cost of Improvements	41,549.09	
Total Cost		$142,517.70
Net Profit		$102,282.76

WHEREFORE, petitioners pray that this Board may hear the proceeding, consider the assignments of error and redetermine the tax liability in accordance therewith, and grant such other and further relief as the facts and premises justify.

(s) THEODORE B. BENSON,
917 Southern Building,
Washington, D. C.,
Counsel for Petitioners. [9]

State of California
County of Los Angeles—ss.

James M. O'Brien, being duly sworn, says that he is one of the trustees of the Western Avenue Golf Club appointed under the Declaration of Trust referred to in the foregoing petition, and as such is duly authorized to verify the foregoing petition; that he has read the said petition, or had the same read to him, and is familiar with the statements therein contained, and that the facts therein stated are true except such facts as are stated to be upon

information and belief, and those facts he believes to be true.

(Sgd.) JAMES M. O'BRIEN

Sworn to before me this 3rd day of October, 1928.

THEDA S. BRADLEY

Notary Public [10]

State of California
County of Los Angeles—ss.

T. A. Morrissey, being duly sworn, says that he is one of the trustees of the Western Avenue Golf Club appointed under the Declaration of Trust referred to in the foregoing petition, and as such is duly authorized to verify the foregoing petition; that he has read the said petition, or had the same read to him, and is familiar with the statements therein contained, and that the facts therein stated are true except such facts as are stated to be upon information and belief, and those facts he believes to be true.

Sgd. T. A. MORRISSEY

Sworn to before me this 3rd day of October, 1928.

THEDA S. BRADLEY

Notary Public [11]

EXHIBIT "A"

TREASURY DEPARTMENT
Washington

August 20, 1928

IT:AR:A-5
NMP
Western Avenue Golf Club Trust,
824 Van Nuys Building,
210 West 7th Street,
Los Angeles, California.

Sirs:

In accordance with the provisions of Section 279(a) of the Revenue Act of 1926, there has been assessed against you an income and profits tax amounting to $8,518.12 for the taxable year 1924, 1925 and 1926, the details of which are set forth in the attached statement.

In accordance with the provisions of Section 274(a) of the same Act, you are allowed sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter within which to file a petition with the United States Board of Tax Appeals, contesting in whole or in part the correctness of this determination.

Respectfully,

D. H. BLAIR,
Commissioner.
By C. B. Allen
Deputy Commissioner

Enclosure: Statement Form 882 [12]

STATEMENT

August 20, 1928.

IT:AR:A-5
NMP

In re: Western Avenue Golf Club Trust, 824 Van Nuys Building, 210 West 7th Street, Los Angeles, California.

Years	Deficiency in Tax
1924	$3,567.16
1925	3,240.91
1926	1,710.05
Total	$8,518.12

1924

Net income reported on return		$21,114.30
Add:		
1. Dividends	$56,829.77	
2. Additional profit on real estate sales	6,226.43	63,056.20
		$84,170.50
Deduct:		
3. Dividends, domestic corporations	$53,560.65	
4. Depreciation	26.78	53,587.43
Net income as adjusted		$30,583.07

Explanation of Changes

1. Dividends are held to be a distribution of profits, therefore, are not allowable deductions as

ordinary and necessary business expenses under Section 234 (a) (1), Revenue Act of 1924. [13]

2. Collections in 1924 on real estate sold in 1921 $47,223.57
Per cent profit 50.405%
Realized profit ($47,223.57 x 50.405%) $23,803.04
Realized profit reported 17,576.61
Additional profit $ 6,226.43
Article 45, Regulations 65.

3. Dividends received from domestic corporations are allowable deductions from gross income. Section 234(a)(b) of the Revenue Act of 1924.

4. Depreciation has been allowed in accordance with the provisions of Article 161, Regulations 65. See attached schedule.

Computation of Tax

Net income as adjusted subject to tax at 12½%	$30,583.07
Income tax at 12½%	$ 3,822.88
Tax previously assessed	255.72
Deficiency in tax	$ 3,567.16

1925

Net income reported on return		$23,438.22
Add:		
1. Dividends	$20,648.00	
2. Additional profit on real estate sales	6,243.61	26,891.61
		$50,329.83

Deduct:		
3. Dividends, domestic corporations	$21,973.60	
4. Improvements on land previously sold	261.32	
5. Depreciation	39.47	22,274.39
Net income as adjusted		$28,055.44

[14]

Explanation of Changes.

1. See Explanation #1 for 1924 above. (Section 234(a)(1), Revenue Act of 1926).

2. Collections in 1925 on real estate sold in 1921 $47,032.90

Per cent profit 50.405%

Realized profit ($47,032.90 x 50.405%)	$23,706.93
Realized profit reported	17,463.32
Additional profit	$ 6,243.61

Article 45, Regulations 69.

3. See Explanation #3 for 1924 above. (Section 234(a)(6), Revenue Act of 1926.)

4. This item represents amount expended for improvements on land previously sold which was erroneously included in income reported on return.

5. See attached schedule. (Article 161, Regulations 69).

Computation of Tax

Net income as adjusted subject to tax at 13%		$28,055.44
Income tax at 13%		$ 3,647.28
Tax previously assessed		406.29
Deficiency in tax		$ 3,240.91

1926

Net income reported on return		$16,281.42
Add:		
1. Dividends	$17,511.10	
2. Additional profits on real estate sales	3,539.32	21,050.42
		$37,331.84
Deduct:		
3. Dividends, domestic corporations	$21,973.60	
4. Depreciation	50.08	22,023.68
Net income as adjusted		$15,308.16

[15]

Explanation of Changes.

1. See Explanation #1 for 1924. (Section 234(a)(1), Revenue Act of 1926.)

2. Collections in 1926 on real estate sold in 1921 $25,860.57
   Per cent profit 50.405%
   Realized profit ($25,860.57 x 50.405%) $13,035.02
   Realized profit reported 9,495.70
   Additional profit $ 3,539.32

3. See Explanation #3 for 1924 above. (Section 234 (a)(6), Revenue Act of 1926.)

4. See attached schedule. (Article 161, Regulations 69.)

Computation of Tax

Net income as adjusted	$15,308.16
Less: Exemption	2,000.00
Balance taxable at 13½%	$13,308.16
Income tax at 13½%	$ 1,796.60
Tax previously assessed	86.55
Deficiency in tax	$ 1,710.05

Your claims for refund of $253.72 for 1924, $406.29 for 1925, and $86.55 for 1926 will be rejected. The rejection will officially appear on a schedule to be approved by the Commissioner.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him. [16]

SCHEDULE 1.

Western Avenue Golf Club Trust.

Depreciation Office Furniture

	Balance Purchase	Rate		Reserve December 31, 1923	1924	1925	1926
1924							
January 1	$237.78	10%	12 months	$ 62.16	$ 23.78		
February 29		$11.67	10 months		.97		
April 30		40.66	6 months		2.03		
	$290.11					$ 29.01	
1925							
May 31		$179.25	7 months			10.46	
	$469.36						$ 46.94
1926							
October 31		$131.14	2 months				2.18
November 30		$115.59	1 month				.96
	$716.09						
Totals each year				$ 62.16	$ 26.78	$ 39.47	$ 50.08
Balance to previous period					62.16	88.94	128.41
Amended reserve				$ 62.16	$ 88.94	$128.41	$178.49
Depreciation allowed					$ 26.78	$ 39.47	$ 50.08
Depreciation claimed					None	None	None
Increase					$ 26.78	$ 39.47	$ 50.08

[Title of Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition herein, admits and denies as follows:

1. Denies the allegations of Paragraph 1 of the petition except the Commissioner admits that T. A. Morrissey and James M. O'Brien are trustees of the Western Avenue Golf Club with the principal place of business at 824 Van Nuys Building, Los Angeles, California.

2. Admits the allegations of Paragraph 2 of the petition.

3. Admits that the taxes in controversy are income taxes for the calendar years 1924 to 1926, inclusive, and are in the amount of $8,518.12.

4. Denies the errors complained of in subparagraphs (a), (b), (c) and (d) of Paragraph 4 of the petition.

5. Denies each and every allegation contained in Paragraph 5 of the petition and its subdivisions which is inconsistent with or contrary to the determination of the Commissioner as set forth in the deficiency letter.

Denies generally and specifically each and every allegation contained in the taxpayer's petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the taxpayer's appeal herein be denied.

(Signed) C. M. CHAREST
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
EARL W. SHINN,
EDWIN M. NIESS,
Special Attorneys,
Bureau of Internal Revenue.

[Endorsed]: United States Board of Tax Appeals. Filed. Nov. 30, 1928 [18]

[Title of Court and Cause.]

MOTION FOR LEAVE TO AMEND PETITION AND AMENDMENTS THERETO

Come now the petitioners by their attorney and move the Board for leave to amend the petition by adding to the assignments of error, under paragraph 4, the following:

(e) That the Commissioner of Internal Revenue erroneously mailed the notice of deficiency addressed to "Western Avenue Golf Club Trust," there being no such legal entity as the said Western Avenue Golf Club Trust and the notice of deficiency does, therefore, not comply with the provisions of Section 274 of the Revenue Act of 1926. [19]

(f) That Section 704 of the Revenue Act of

1928 is not to be construed to apply to this proceeding and if so construed the said section is invalid because in contravention of the provisions of the Constitution of the United States and because in excess of the authority conferred upon Congress by the Constitution.

WHEREFORE the petitioners move to amend their petition, to include the errors above set forth which motion it is understood will not be apposed by counsel for respondent and which amendments it is understood will be answered immediately and it will, therefore, not be necessary to postpone the hearing set for October 23, 1929.

THEODORE B. BENSON,
917 Southern Building,
Washington, D. C.,
Counsel for Petitioner.

[Endorsed]: United States Board of Tax Appeals. Granted Oct. 21, 1929.

[Endorsed]: United States Board of Tax Appeals. Filed Oct. 17, 1929. [20]

[Title of Court and Cause.]

ANSWER TO AMENDMENTS TO PETITION

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the amendment to the petition herein, admits and denies as follows:

(e) Respondent denies the allegation in para-

graph (e) of the amendment to the petition that the notice of deficiency was erroneously mailed to the Western Avenue Golf Club Trust, and further denies the allegation that there was no such legal entity as the Western Avenue Golf Club Trust.

(f) Respondent denies paragraph (f) of the amendment to the petition.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
RALPH S. SCOTT,
EDWIN M. NIESS,
Special Attorneys,
Bureau of Internal Revenue.

[Endorsed]: United States Board of Tax Appeals. Filed Dec. 19, 1929. [21]

[Title of Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true.

1. The tax in controversy is that for the calendar years 1923, 1924, 1925, and 1926, but in arriving

at the correct net income for 1923 it is necessary to determine the amount of the net loss if any for the years 1921 and 1922.

2. On October 4, 1921, T. A. Morrissey and James M. O'Brien executed a declaration of trust to certain real estate in the city of Los Angeles, a copy of which said declaration is attached to the Petition in Docket No. 34287 [22] and made a part thereof and marked Exhibit "B". Said Trust was known as Western Avenue Golf Club Trust.

3. The petitioners filed returns as a trust for the years 1921, 1922 and 1923, under the provisions of Section 219 of the Revenue Act of 1921, for the year 1924 under the provisions of Section 219 of the Revenue Act of 1924, and for the years 1925 and 1926 under the provisions of Section 219 of the Revenue Act of 1926, and determined the income and computed the tax as of a trust for all of said years and in the manner prescribed by Part I. of the said Acts. Under date of October 31, 1927, the Commissioner of Internal Revenue made an audit and examination of the above returns of the petitioner and determined that the declaration of trust created an association within the meaning of Part II. of the said Acts and also determined the income and computed the tax as of a corporation.

4. During the years 1921 and 1922 the trustees sold beneficial interests in the trust and paid commissions to salesmen for selling such interests. The beneficial interests were sold at face value and the commissions were paid by the trustees to the salesmen. Payments of such commissions made during

the year 1921 amounted to $5692.90, and during the year 1922 amounted to $5036.15. In the returns made by the trustees for the years 1921 and 1922 the commissions so paid were deducted from gross income in computing the amount of the net loss. In his computations of the net loss for each of the said years the Commissioner of Internal Revenue added the amount of the commissions back to gross income. [23]

5. The property described in the said declaration of trust consisted of 155 acres of land, about 42 acres of which were surveyed into lots and the sale thereof was begun December 20, 1921 through a broker and his salesmen.

6. The commissions to the broker and other selling expenses paid during the year 1921 amounted to $7272.40, during the year 1922 to $34,876.09 and during the year 1923 to $416.05. In the returns filed for the years 1921, 1922 and 1923 the amounts paid as selling expenses were added to the cost of the land in determining the percentage of profit realized on sales made during such years and in determining the percentage of profit on collections made during subsequent years. The respondent determined the amounts paid as commissions and other selling expenses to be deductible expenses for each of the years in which paid and proceeded to determine the net loss for the year 1921 by deducting from gross income the sum of $7272.40, for the year 1922 by deducting from gross income the sum of $34,876.09, and to determine net income for the year 1923 by deducting from gross income the sum of

$416.05, and then proceeded to determine the percentage of profit on sales by eliminating the said amounts from the cost of the land.

7. In his determination of the amount of the net loss for the calendar years 1921 and 1922, and in his determination of the net income for the calendar years 1923, 1924, 1925 and 1926 the respondent treated all sales of lots com- [24] prised in the said 42 acres of land as having been made on the installment basis. Included in the sales determined by the respondent to have been made on the installment basis for the year 1921 were sales in the amount of $1850.00 in which more than 25% of the sales price was received in cash during the said year 1921; included in the sales for the year 1922 were sales in the amount of $82,705.00 in which more than 25% of the sales price was received in cash during the said year 1922; and included in sales for the year 1923 were sales in the amount of $2125.00 in which the cash payment received during the said year was more than 25% of the sales price. It is stipulated that said sales of $1,850.00 in 1921, $82,705.00 in 1922 and $2,125.00 in 1923 shall be treated as cash transactions of 1921, 1922 and 1923, respectively, and that no part of the collections made on said sales during years subsequent to the years in which such cash transactions severally were made shall be treated as taxable income of petitioner for such subsequent years.

8. During the years 1921, 1922, 1923, 1924, 1925 and 1926 the trustees made distributions of profits

to the beneficiaries of the trust in the respective amounts of $138.82, $5662.90, $13,842.22, $56,829.77, $20,648.00 and $17,511.10. In the returns filed for the said years the amounts so distributed were deducted from gross income. The respondent, having determined as aforesaid that the declaration of trust created an association, denied the said deductions and restored the said amounts to gross income [25] for the purpose of determining the amount of the net loss for the years 1921 and 1922, and the net income for the years 1923, 1924, 1925 and 1926.

9. The 42 acres of land abovementioned were surveyed and platted into lots and beginning December 20, 1921, the lots were sold through a broker and his salesmen. The subdivided property was during the year 1922 improved by the construction of streets, side-walks and curbs. All of the lots were sold during 1921, 1922 and 1923 and collections on sales contracts were made through the collection department of a bank.

10. On that part of the property not subdivided a golf course was constructed, and completed in September 1922 and a club house connected with it was completed in December 1922, which were used by the members of the club and their guests until January 12, 1924 on which date all club activities ceased. Each beneficiary in the trust received a free membership entitling him to club privileges on the payment of the regular fees and later memberships without beneficial interests were sold under a plan requiring refund (less a small monthly amortization, the equivalent of dues) in case of discontinu-

ance of the club activities, which net refunds were in fact paid a short time after the club activities ceased on the date hereinabove mentioned. The club was private and privileges were available only to members and their guests and not to the public in general. No dues were charged, but all persons using the golf course [26] were required to pay a fixed greens fee. The dining room and golf supplies department were operated by concessionaires on a percentage basis.

11. In July, 1923, the 113 acres of land comprising the golf course, together with all improvements and equipment, were conveyed and transferred to Western Avenue Golf Club, Inc., a California Corporation, in exchange for its stock, and without other consideration. No tax on said transfer was paid by petitioners and none is claimed by respondent to be payable thereon. During the years 1924, 1925, and 1926 petitioner received from said corporation dividends upon the Stock thereof so acquired by the petitioner amounting in 1924 to $53,560.65, in 1925 to $21,973.60 and in 1926 to $21,973.60, all of which were returned as income by petitioner for the years in which they were received. Respondent in his determination of the tax liability of petitioner, eliminated said dividends from the taxable income of petitioner for the years in which such dividends were so received, treating such dividends as non-taxable against petitioner, as an association.

12. Petitioner, under a lease from said Western Avenue Golf Club, Inc., continued the operation of

said golf course until January 12, 1924 on which date such operations ceased. The gross receipts from said golf course operations during said 12 day period in 1924 amounted to less than $400.00 which amount was included by petitioner in gross income returned. [27]

13. The installation of and payment for improvements in said 42 acre subdivision was begun in 1921 and finished in 1922. Sales of lots in said subdivision were begun in 1921 and finished in 1922. Collections of installments of principal and interest upon the contracts of purchase of lots in said subdivision were made in 1921 to 1926 inclusive, by a bank as collection agent for petitioner. Petitioner also during said years collected certain assignment fees from purchasers upon the assignment by them of their contracts of purchase. During the period from September 1, 1922 until January 12, 1924 petitioner collected, (1) from members and their guests certain fees for the use of said golf course, (2) from members certain assignment fees upon the assignment of their memberships, and (3) from concessionaires operating such club departments as dining room, golf shop, etc., certain rents for such concessions. No activities have been engaged in by petitioner between December 31, 1923 and January 1, 1927 except (1) operation of said golf course for the first 12 days of 1924 as aforesaid, (2) Receipt from collection agent bank of principal and interest so collected by said bank in behalf of petitioner, (3) Receipt of credit of interest earned on bank balances, (4) Receipt of assignment fees in

assignment of lot purchase contracts by holders thereof, (5) Conveyance of lots to purchasers thereof, (6) Receipt of dividends from Western Avenue Golf Club, Inc., upon shares thereof owned by petitioner, (7) Distribution of moneys [28] to holders of beneficial interests in petitioner trust by way of dividends and, in some cases, by way of redemption and retirement of their beneficial interests.

14. T. A. Morrissey and J. M. O'Brien, who were appointed as sole trustees of petitioner Western Avenue Golf Club Trust by the aforementioned declaration of Trust have ever since continued to be and now are the sole trustees of said petitioner. The number of beneficial interests issued by said petitioner Western Avenue Golf Club Trust and outstanding between December 31, 1922 and January 1, 1927, and the number of said beneficial interests owned during said period by said named trustees as individuals were as follows:

Column 1 Date	Column 2 Total No. Outstanding	Column 3 Total No. owned by T. A. Morrissey	Column 4 Total No. owned by J. M. O'Brien	Column 5 Total of Columns 3 & 4	Column 6 Percentage Ratio of Column 5 to Column 2
Dec. 31, 1922	3019	169 24/100	1107 69/100	1276 93/100	42.3%
Mar. 31, 1923	3013	"	"	"	42.4%
June 30, 1923	"	"	"	"	"
Sept. 30, 1923	3015	"	"	"	"
Dec. 31, 1923	3016	110	375 22/100	485 22/100	16. %
Mar. 31, 1924	2897	83	"	451 22/100	15.8%
June 30, 1924	2783	"	412 22/100	495 22/100	17.7%
Sept. 30, 1924	2712	"	"	"	18.2%
Dec. 31, 1924	2680	"	"	"	18.4%
Mar. 31, 1925	2607	133	416 91/100	594 91/100	22.8%
June 30, 1925	2596	"	"	"	22.9%
Sept. 30, 1925	2570	"	"	"	23.1%
Dec. 31, 1925	2561	170 93/100	"	632 84/100	24.7%
Mar. 31, 1926	2407	"	"	"	26.2%
June 30, 1926	2203	"	"	"	28.7%
Sept. 30, 1926	2175	"	"	"	29 %
Dec. 31, 1926	2172	"	"	"	29.1%

[29]

The number of benefical interests owned by said trustees as individuals did not at any time during said period exceed the number shown above nor exceed the percentage shown above of the whole number then outstanding.

The following is the approximate number of persons holding beneficial interests in said Western Avenue Golf Club Trust on the dates shown, to wit:

Dec. 31, 1922	890	Persons
" " 1923	920	"
" " 1924	675	"
" " 1925	570	"
" " 1926	275	"

Done this 9th day of June, 1932.

THEODORE B. BENSON
JAMES M. O'BRIEN
Attorneys for Petitioner.
C. M. CHAREST, J.M.L.,
Attorney for Respondent.

[Endorsed]: United States Board of Tax Appeals. Filed at hearing June 10, 1932. Div. 5, Docket Nos. 34287, 40977. [30]

[Title of Court and Cause.]

Docket Nos. 34287, 40977.

James M. O'Brien, Esq., and Theodore B. Benson, Esq., for the petitioners.
J. M. Leinenkugel, Esq., for the respondent.

MEMORANDUM OPINION.

SMITH: These proceedings, consolidated for hearing, are for the redetermination of deficiencies in income tax for 1923 (Docket No. 34287), 1924, 1925, and 1926 (Docket No. 40977), in the respective

amounts of $1,889.70, $3,567.16, $3,240.91, and $1,710.05. Some of the allegations of error contained in the petition have been waived and another has been [31] settled by stipulation of facts. The petitioners appealing to this Board on behalf of Western Avenue Golf Club are hereinafter referred to as the petitioner. The issues to be determined are:

1. Whether the deficiency notices herein were sent to the petitioner in accordance with the provisions of section 274 of the Revenue Act of 1926.

2. Whether section 704 of the Revenue Act of 1928 is unconstitutional if construed to apply to these proceedings.

3. Whether the petitioner is taxable as a trust or as an association in the years 1921 to 1926, inclusive.

4. Whether all sales of real estate made by the petitioner in 1921, 1922, and 1923 were on the installment basis or whether some of the sales were for cash.

5. Whether in computing the profits realized by the petitioner on installment sales of real estate in 1921, 1922, and 1923 the commissions paid to agents and other selling expenses are deductible from gross income in those years, or whether they are deductible from the sales prices in determining the percentage of profits on the installment sales.

6. Whether the commissions paid by the petitioner in 1921 and 1922 on the sales of its certificates of shares to the beneficiaries are deductible as ordinary and necessary expenses of those years.

7. Whether the petitioner is taxable upon any of its income in the years involved in these proceed-

ings in view of the fact, as alleged, that under the laws of the State of California, it was prohibited from accumulating any of its income for the beneficiaries. [32]

The years 1921 and 1922 are in issue only for the purpose of determining the net losses, if any, for those years which are deductible from the gross income of 1923. The parties have filed a written stipulation setting forth the principal facts.

The petitioner was created by a declaration of trust executed on October 4, 1921, by T. A. Morrissey and James M. O'Brien, who were therein designated trustees and who, in their "collective capacity," were to be known as "Western Avenue Golf Club." Under the provisions of the instrument, Morrissey and O'Brien were to hold certain real estate, comprising a tract of 155 acres, situated in the City of Los Angeles, California—

> "* * * which property has already been conveyed to us, and also any and all other property, real, personal, or mixed, which may hereafter be conveyed or transferred to or acquired by us or them [their successors] as trustees hereunder, together with the proceeds and avails thereof in trust upon the trusts hereinafter set forth to maintain and to dispose of the same, and to collect, receive, hold and distribute the net income thereof for the benefit of the beneficiaries from time to time, whose beneficial interests in said property are represented by certificates for shares of beneficial interest issued hereunder according to the num-

ber of such shares held by them respectively, and in accordance with the priorities hereinafter expressed, and in the manner and subject to the stipulation herein contained, * * *"

The instrument further provides that—

"18. During the continuance of this trust the beneficial interests therein and thereunder shall be solely evidenced by certificates for shares of beneficial interest for which provision is hereinafter made.

"19. Such beneficial shares shall be divided into two thousand (2,000) preferred shares of the par value of One Hundred ($100.00) Dollars each, and two thousand (2,000) common shares of no par value." [33]

The holders of the preferred shares were entitled to receive $8 per share per annum out of the "surplus profits" or "surplus dividends." The holders of the common shares were entitled to receive—

"* * * when and as declared by the trustees out of the surplus profits arising from the business of said trust, or surplus, dividends at such rate as may be determined and decided upon by the trustees in the exercise of their absolute discretion, not exceeding the rate of $8.00 per share per annum, * * *"

The remaining profits, if any, were to be distributed at the discretion of the trustees to both the preferred and common shareholders.

The trustees were authorized to make additional assessments against the common shares in the same

manner as provided by the Civil Code of California in the case of corporations organized for profit, with certain exceptions not here material.

The trustees had exclusive management of and control over the business and property of the trust—

> "* * * it being expressly declared that the said shareholders, otherwise sometimes referred to herein as beneficiaries, are cestuis que trustent, and hold no other relation to the trustees than that of cestuis que trustent hereunder. The shareholders shall only have the rights specifically set forth in this instrument, that is to say, the right to dividends, only as the same shall be declared by the trustees, * * *"

The trustees were empowered to increase their own number and to elect successor trustees by a majority vote. They were also authorized to appoint an advisory board to be known as directors, consisting of not more than 15 persons but the appointment of such board was not in any way to limit their own powers.

The written stipulation of facts referred to above is in part as follows: [34]

> "3. The petitioners filed returns as a trust for the years 1921, 1922 and 1923, under the provisions of Section 219 of the Revenue Act of 1921, for the year 1924 under the provisions of Section 219 of the Revenue Act of 1924, and for the years 1925 and 1926 under the provisions of Section 219 of the Revenue Act of

1926, and determined the income and computed the tax as of a trust for all of said years and in the manner prescribed by Part I. of the said Acts. Under date of October 31, 1927, the Commissioner of Internal Revenue made an audit and examination of the above returns of the petitioner and determined that the declaration of trust created an association within the meaning of Part II. of the said Acts and also determined the income and computed the tax as of a corporation.

"4. During the years 1921 and 1922 the trustees sold beneficial interests in the trust and paid commissions to salesmen for selling such interests. The beneficial interests were sold at face value and the commissions were paid by the trustees to the salesmen. Payments of such commissions made during the year 1921 amounted to $5692.90, and during the year 1922 amounted to $5036.15. In the returns made by the trustees for the years 1921 and 1922 the commissions so paid were deducted from gross income in computing the amount of the net loss. In his computations of the net loss for each of the said years the Commissioner of Internal Revenue added the amount of the commissions back to gross income.

"5. The property described in the said declaration of trust consisted of 155 acres of land, about 42 acres of which were surveyed into lots and the sale thereof was begun December 20, 1921 through a broker and his salesmen.

"6. The commissions to the broker and other selling expenses paid during the year 1921 amounted to $7272.40, during the year 1922 to $34,876.09 and during the year 1923 to $416.05. In the returns filed for the years 1921, 1922 and 1923 the amounts paid as selling expenses were added to the cost of the land in determining the percentage of profit realized on sales made during such years and in determining the percentage of profit on collections made during subsequent years. The respondent determined the amounts paid as commissions and other selling expenses to be deductible expenses for each of the years in which paid and proceeded to determine the net loss for the year 1921 by deducting from gross income the sum of $7272.40, for the year 1922 by deducting from gross income the sum of $34,876.09, and to determine net income for the year 1923 by [35] deducting from gross income the sum of $416.05, and then proceeded to determine the percentage of profit on sales by eliminating the said amounts from the cost of the land.

"7. In his determination of the amount of the net loss for the calendar years 1921 and 1922, and in his determination of the net income for the calendar years 1923, 1924, 1925 and 1926 the respondent treated all sales of lots comprised in the said 42 acres of land as having been made on the installment basis. Included in the sales determined by the respondent to have been made on the installment

basis for the year 1921 were sales in the amount of $1850.00 in which more than 25% of the sales price was received in cash during the said year 1921; included in the sales for the year 1922 were sales in the amount of $82,705.00 in which more than 25% of the sales price was received in cash during the said year 1922; and included in sales for the year 1923 were sales in the amount of $2,125.00 in which the cash payment received during the said year was more than 25% of the sales price. It is stipulated that said sales of $1,850.00 in 1921, $82,705.00 in 1922 and $2,125.00 in 1923 shall be treated as cash transactions of 1921, 1922 and 1923, respectively, and that no part of the collections made on said sales during years subsequent to the years in which such cash transactions severally were made shall be treated as taxable income of petitioner for such subsequent years.

"8. During the years 1921, 1922, 1923, 1924, 1925 and 1926 the trustees made distributions of profits to the beneficiaries of the trust in the respective amounts of $138.82, $5662.90, $13,842.22, $56,829.77, $20,648.00 and $17,511.10. In the returns filed for the said years the amounts so distributed were deducted from gross income. The respondent, having determined as aforesaid that the declaration of trust created an association, denied the said deductions and restored the said amounts to gross income for the purpose of determining the amount of the net loss for the years 1921 and 1922, and the net income for the years 1923, 1924, 1925 and 1926.

"9. The 42 acres of land abovementioned were surveyed and platted into lots and beginning December 20, 1921, the lots were sold through a broker and his salesmen. The subdivided property was during the year 1922 improved by the construction of streets, sidewalks and curbs. All of the lots were sold during 1921, 1922 and 1923 and collections on sales contracts were made through the collection department of a bank. [36]

"10. On that part of the property not subdivided a golf course was constructed and completed in September 1922 and a club house connected with it was completed in December 1922, which were used by the members of the club and their guests until January 12, 1924 on which date all club activities ceased. Each beneficiary in the trust received a free membership entitling him to club privileges on the payment of the regular fees and later memberships without beneficial interests were sold under a plan requiring refund (less a small monthly amortization, the equivalent of dues) in case of discontinuance of the club activities, which net refunds were in fact paid a short time after the club activities ceased on the date hereinabove mentioned. The club was private and privileges were available only to members and their guests and not to the public in general. No dues were charged, but all persons using the golf course were required to pay a fixed greens fee. The dining room and golf

supplies department were operated by concessionaires on a percentage basis.

"11. In July 1923, the 113 acres of land comprising the golf course, together with all improvements and equipment, were conveyed and transferred to Western Avenue Golf Club, Inc., a California Corporation, in exchange for its stock, and without other consideration. No tax on said transfer was paid by petitioners and none is claimed by respondent to be payable thereon. During the years 1924, 1925, and 1926 petitioner received from said corporation dividends upon the Stock thereof so acquired by the petitioner amounting in 1924 to $53,560.65, in 1925 to $21,973.60 and in 1926 to $21,973.60, all of which were returned as income by petitioner for the years in which they were received. Respondent in his determination of the tax liability of petitioner, eliminated said dividends from the taxable income of petitioner for the years in which such dividends were so received, treating such dividends as non-taxable against petitioner, as an association.

"12. Petitioner, under a lease from said Western Avenue Golf Club, Inc., continued the operation of said golf course until January 12, 1924 on which date such operations ceased. The gross receipts from said golf course operations during said 12 day period in 1924 amounted to less than $400.00 which amount was included by petitioner in gross income returned.

"13. The installation of and payment for improvements in said 42 acre subdivision was begun in 1921 and finished in 1922. Sales of lots in said subdivision were begun in 1921 and finished in 1922. Collections of installments of principal and [37] interest upon the contracts of purchase of lots in said subdivision were made in 1921 to 1926 inclusive, by a bank as collection agent for petitioner. Petitioner also during said years collected certain assignment fees from purchasers upon the assignment by them of their contracts of purchase. During the period from September 1, 1922 until January 12, 1924 petitioner collected, (1) from members and their guests certain fees for the use of said golf course, (2) from members certain assignment fees upon the assignment of their memberships, and (3) from concessionaires operating such club departments as dining room, golf shop, etc., certain rents for such concessions. No activities have been engaged in by petitioner between December 31, 1923 and January 1, 1927 except: (1) operation of said golf course for the first 12 days of 1924 as aforesaid, (2) Receipt from collection agent bank of principal and interest so collected by said bank in behalf of petitioner, (3) Receipt of credit of interest earned on bank balances, (4) Receipt of assignment fees in assignment of lot purchase contracts by holders thereof, (5) Conveyance of lots to purchasers thereof, (6) Receipt of dividends from Western Avenue Golf Club, Inc., upon shares thereof owned

by petitioner, (7) Distribution of moneys to holders of beneficial interests in petitioner trust by way of dividends and, in some cases, by way of redemption and retirement of their beneficial interests.

"14. T. A. Morrissey and J. M. O'Brien, who were appointed as sole trustees of petitioner Western Avenue Golf Club Trust by the aforementioned declaration of Trust have ever since continued to be and now are the sole trustees of said petitioner. The number of beneficial interests issued by said petitioner Western Avenue Golf Club Trust and outstanding between December 31, 1922 and January 1, 1927, and the number of said beneficial interests owned during said period by said named trustees as individuals were as follows: [38]

Column 1 Date	Column 2 Total No. Outstanding	Column 3 Total No. owned by T. A. Morrissey	Column 4 Total No. owned by J. M. O'Brien	Column 5 Total of Columns 3 & 4	Column 6 Percentage Ratio of Column 5 to Column 2
Dec. 31, 1922	3019	169 24/100	1107 69/100	1276 93/100	42.3%
Mar. 31, 1923	3013	"	"	"	42.4%
June 30, 1923	"	"	"	"	"
Sept. 30, 1923	3015	"	"	"	"
Dec. 31, 1923	3016	110	375 22/100	485 22/100	16. %
Mar. 31, 1924	2897	83	"	451 22/100	15.8%
June 30, 1924	2783	"	412 22/100	495 22/100	17.7%
Sept. 30, 1924	2712	"	"	"	18.2%
Dec. 31, 1924	2680	"	"	"	18.4%
Mar. 31, 1925	2607	133	416 91/100	594 91/100	22.8%
June 30, 1925	2596	"	"	"	22.9%
Sept. 30, 1925	2570	"	"	"	23.1%
Dec. 31, 1925	2561	170 93/100	"	632 84/100	24.7%
Mar. 31, 1926	2407	"	"	"	26.2%
June 30, 1926	2203	"	"	"	28.7%
Sept. 30, 1926	2175	"	"	"	29 %
Dec. 31, 1926	2172	"	"	"	29.1%

The number of benefical interests owned by said trustees as individuals did not at any time during said period exceed the number shown above nor exceed the percentage shown above of the whole number then outstanding.

The following is the approximate number of persons holding beneficial interests in said Western Avenue Golf Club Trust on the dates shown, to wit:

Dec. 31, 1922	890	Persons
" " 1923	920	"
" " 1924	675	"
" " 1925	570	"
" " 1926	275	"

The issues will be discussed in the order in which they appear above. [39]

1. and 2. The petitioner's first and second contentions are that there is and was no such legal entity as the Western Avenue Golf Club or the Western Avenue Golf Club Trust and that the notices of deficiency upon which the petitions to the Board are predicated do not comply with the provisions of section 274 of the Revenue Act of 1926, and that section 704 of the Revenue Act of 1928 is not to be construed to apply to these proceedings, and that if so construed it is invalid because in contravention of the provisions of the Constitution of the United States and because in excess of the authority conferred upon Congress by the Constitution.

The deficiency notice in Docket No. 34287, for 1923, was addressed to "Western Avenue Golf Club, T. A. Morrissey and J. M. O'Brien, Trustees," and in Docket No. 40977, the deficiency notice for 1924, 1925, and 1926 was addressed to "Western Avenue Golf Club Trust," both notices being addressed to 824 Van Nuys Building, Los Angeles, California, the

petitioner's correct address. The petitions in both docket numbers were filed in the name of "T. A. Morrissey and James M. O'Brien, Trustees of an Express Trust, known as Western Avenue Golf Club." Apparently the deficiencies set forth in the deficiency notices referred to were computed from the returns filed by Western Avenue Golf Club as a trust.

Clearly, the trustees were the proper parties to file the petitions with the Board. Cf. William B. Thalhimer, et al., Executors, v. Commissioner, 62 Fed. (2d) 703, (C. C. A. 4), decided January 10, 1933. The petitioner has not advanced any valid reason why section 704 should be held unconstitutional as applied to these proceedings. [40]

We can see no merit in either of these contentions. They are not argued by the petitioner in its brief and we can find no support for them either in the facts or in the law.

3. The substance of this contention is that the petitioner was not an association taxable as a corporation in the years 1921 to 1926, inclusive, but was a trust taxable under section 219 of the Revenue Acts of 1921, 1924, and 1926.

Section 704 of the Revenue Act of 1928 provides in part that—

> "(a) If a taxpayer filed a return as a trust for any taxable year prior to the taxable year 1925 such taxpayer shall be taxable as a trust for such year and not as a corporation, if such taxpayer was considered to be taxable as a trust

and not as a corporation either (1) under the regulations in force at the time the return was made or at the time of the termination of its existence, or (2) under any ruling of the Commissioner or any duly authorized officer of the Bureau of Internal Revenue applicable to any of such years, and interpretative of any provision of the Revenue Act of 1918, 1921, or 1924, which had not been reversed or revoked prior to the time the return was made, or under any such ruling made after the return was filed which had not been reversed or revoked prior to the time of the termination of the taxpayer's existence."

We have heretofore held in applying this section of the Act that under the Commissioner's Regulations and Bureau rulings, in effect up to and including the calendar year 1923, and prior to the change in the Commissioner's rulings giving effect to the decision in Hecht v. Malley, 265 U. S. 144, decided May 12, 1924, the test to be applied in distinguishing trusts from associations was whether the beneficiaries of shareholders controlled the action of the trustees. See E. A. Landreth Co., et al., 15 B. T. A. 655; Van Cleave Trust, 18 B. T. A. 486; [41] Commercial Trust Co., 18 B. T. A. 1248; Rollin S. Sturgeon, et al., Trustees, 25 B. T. A. 368; Twin Bell Oil Syndicate, 26 B. T. A. 165. Under the trust instrument herein considered, the shareholders had no control over the trustees or the management of the business. The trustees filed returns as a trust

for all of the years 1921 to 1926, inclusive. We therefore hold that the petitioner is taxable as a trust for the years 1921, 1922, and 1923. For the subsequent years 1924, 1925, and 1926, the test to be applied, as stated in Rollin S. Sturgeon, et al., Trustees, supra, is whether—

> "* * * (1) the beneficiaries of the alleged trust have voluntarily associated themselves together in the general form and mode of procedure of a corporation, and (2) are organized to, and in fact are, engaged in the active conduct of a business for profit, or (3) whether the trustees are merely holding the property and collecting the income therefrom and distributing to those beneficially interested. Extension Oil Co., 16 B. T. A. 1028; affd., 47 Fed. (2d) 65; Jackson-Wermich Trust, 24 B. T. A. 150; E. B. Galbreath, et al., 24 B. T. A. 1107."

The petitioner was created principally for the purpose of developing and selling the tract of real estate which was conveyed to it by Morrissey and O'Brien, and in conjunction therewith to operate a golf course and other adjuncts of the real estate subdivision. These activities were begun immediately. The petitioner was clearly an active business trust as distinguished from a liquidating trust.

It is apparent, too, from the provisions of the trust instrument, which we will not discuss in detail, that the petitioner had many of the characteristics indicative of corporate organization. We are of the [42] opinion, therefore, that for the

years 1924, 1925, and 1926 the petitioner is taxable as an association. See also Little Fork Oil & Gas Co. v. Lewellyn, 29 Fed. (2d) 137; Trust No. 5833, Security First Nat. Bank of Los Angeles v. Welch, 54 Fed. (2d) 323; Twin Bell Oil Syndicate, supra, and cases therein cited.

The fact that the petitioner did not make any sales of real estate after early in 1923 does not alter its taxable status for the subsequent years during which it continued to receive profits and distribute them to the beneficiaries. G. F. Sloan, et al., v. Commissioner, ... Fed. (2d) ....., (C. C. A. 9), decided February 20, 1933, affirming G. F. Sloan, et al., 24 B. T. A. 61.

4. This issue is settled by the facts stated in paragraph 3 above of the written stipulation.

5. The petitioner contends that the commissions and other expenses of selling the subdivision lots in 1921, 1922, and 1923 should be deducted from the sales prices and thus pro-rated over the installment contracts for the purpose of determining the percentage of profits realized on installment sales rather than deducted from gross income as ordinary and necessary expenses of the years of such sales. The petitioner so treated these items in its returns for 1921, 1922, and 1923 when the sales were made. The petitioner was not a dealer in real estate. It was organized as above stated for the purpose of developing and selling the single tract of land conveyed to it by Morrissey and O'Brien. It never acquired or sold any other real estate. It never held a broker's license. The [43] sales of the lots were

made through a broker. The petitioner's contention on this issue is sustained upon authority of Mrs. E. A. Griffin, 19 B. T. A. 1243, and cases following that decision.

6. The petitioner seeks to deduct as ordinary and necessary expenses commissions paid to salesmen on sales of its own shares in 1921 and 1922 in the amounts of $5,692.90 and $5,036.15, respectively. We are of the opinion that these amounts are not deductible. Such expenditures are of a capital nature and are therefore not deductible as business expenses. They serve to reduce the selling price of the capital stock or shares. Charles H. Lilly Co., 2 B. T. A. 1058; Emerson Electric Mfg. Co., 3 B. T. A. 932; Simmons Co., 8 B. T. A. 631; affd. 33 Fed. (2d) 75; Corning Glass Works, 9 B. T. A. 771; affd. 37 Fed. (2d) 798.

7. With respect to this issue, the petitioner states in its brief that—

> "Because its declaration of trust contained what was then a customary provision in California trusts allowing the trustees to accumulate income, Petitioner trust believed that under the law and regulations it would be required to return and pay the tax, instead of having the beneficiaries do so. However, the Supreme Court of California in the case of Estate of Yates, 170 Calif. 254, [149 Pac. 555], has held that such provisions allowing the accumulation are void. This then squarely places petitioner trust in the classification of trusts whose in-

come must be returned by the beneficiaries and whose tax must be paid by them."

We decided this identical question in Max Wolf, et al., Trustees, 10 B. T. A. 835, where we held that the provision of a trust for the accumulation of income was void under the laws of the State of California and that the income was therefore distributable to the beneficiaries and taxable to them rather than to the trust entity under the provisions of [44] section 219 of the Revenue Acts of 1918 and 1921. Sections 723 and 724 of the Civil Code of California, 1927, Deering, read in part as follows:

"§ 723. Accumulations, when void. All directions for the accumulation of the income of property, except such as are allowed by this title, are void.

* * * * * * *

"§ 724. Accumulation of income. An accumulation of the income of property, for the benefit of one or more persons, may be directed by any will or transfer in writing sufficient to pass the property out of which the fund is to arise, as follows:

1. If such accumulation is directed to commence on the creation of the interest out of which the income is to arise, it must be made for the benefit of one or more minors then in being, and terminate at the expiration of their minority; or,

2. If such accumulation is directed to com-

mence at any time subsequent to the creation of the interest out of which the income is to arise, it must commence within the time in this title permitted for the vesting of future interests, and during the minority of the beneficiaries, and terminate at the expiration of such minority."

For other judicial decisions holding the directions for the accumulation of income void under the laws of the State of California, see in re Pforr's Estate, 144 Cal. 121; 77 Pac. 825; In re Duffill's Estate, 180 Cal. 748; 183 Pac. 337.

We also held in Estate of Henry Mayer, 16 B. T. A. 1164, that the income of a trust, created and existing under the laws of Pennsylvania, which likewise prohibited the accumulation of income, was distributable to the beneficiaries and therefore taxable to them rather than to the trust, under section 219 of the Revenue Acts of 1918 and 1921. Upon authority of the cases cited, we hold that the petitioner's income in the years 1921, 1922, and 1923 was distributable to the beneficiaries and is therefore [45] taxable to them and not to the petitioner. This determination, however, has no application to the subsequent years 1924, 1925, and 1926 for which we have determined that the petitioner was an association taxable as a corporation.

Judgment will be entered under Rule 50.

[Endorsed]: United States Board of Tax Appeals. Entered Mar. 24, 1933. [46]

United States Board of Tax Appeals
Washington

Docket Nos. 34287, 40977.

T. A. MORRISSEY and JAMES M. O'BRIEN, Trustees of an Express Trust, known as WESTERN AVENUE GOLF CLUB,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION.

Pursuant to the Memorandum Opinion in the above proceedings, entered March 24, 1933, counsel for the respondent, on May 24, 1933, filed a notice of settlement which was set down for hearing, under Rule 50 of the Board's Rules of Practice, on June 21, 1933. Counsel for the petitioners did not appear at the hearing and have filed no objections to the redetermination of the deficiencies made by the respondent. Upon examination, the Board finds that the redetermination made by the respondent is in accord with the Memorandum Opinion entered March 24, 1933. Wherefore, it is—

ORDERED and DECIDED that there is an overpayment of income tax for 1923 in the amount of $489.29 and overassessments to be abated for the years 1924, 1925, and 1926 of $1,676.61, $1,617.42, and $673.15, respectively; and that there are unpaid portions of the correct tax liability to be collected for the years 1924, 1925, and 1926 of $1,890.55,

$1,623.49, and $1,036.90, respectively.

[Signed] C. M. CHAREST,

[Seal] Member.

[Endorsed]: Entered Jun. 23, 1933. [47]

[Title of Court and Cause.]

To the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The petitioners, T. A. Morrissey and James M. O'Brien, trustees of an express trust, known as Western Avenue Golf Club, in support of this their petition, filed pursuant to provisions of Section 1001 of the Act of Congress approved February 26, 1926, (44 Stat. 109), entitled the Revenue Act of 1926, and as amended by Section 608 of the Revenue Act of 1928, (45 Stat. 873), and by Section 1101 of the Revenue Act of 1932, (47 Stat. 286), for the review of the decision of the United States Board of Tax Appeals entered June 23, 1933, Docket No. 40977, respectfully shows to this Honorable Court as follows:

I.

DESIGNATION OF THE COURT OF REVIEW.

The petitioners being agrieved by the decision of the [48] Board of Tax Appeals hereinafter described redetermining deficiencies for the calendar years 1924, 1925 and 1926 in the amounts of $1,890.55, $1,623.49, and $1,036.90, and the said T. A. Morrissey and James M. O'Brien being citizens of

the United States and inhabitants of the State of California with postoffice address at 824 I. N. Van Nuys Building, Los Angeles, California, and the returns for each of the said years having been filed with the Collector of Internal Revenue for the Sixth District of California at Los Angeles, California, desire a review of the said decision of the said United States Board of Tax Appeals by the Circuit Court of Appeals for the Ninth Circuit within which Circuit the petitioners reside and within which Circuit is located the office of the said collector of internal revenue.

II.

STATEMENT OF THE NATURE OF THE CONTROVERSY.

1. That on October 11, 1928 the petitioners filed with the United States Board of Tax Appeals their petition for the redetermination of alleged deficiencies in income tax for the years 1924, 1925 and 1926 in the amounts of $3,567.16, $3,240.91 and $1,710.05 as shown by a notice of deficiency previously mailed to the petitioners by the Commissioner of Internal Revenue on August 20, 1928, the allegations of which said petition in so far as are relative to this petition for review are in substance as follows:

That the petitioners, T. A. Morrissey and James M. O'Brien, are trustees of an express trust known as Western Avenue Golf [49] Club with office and principal place of business at 824 I. N. Van Nuys Building, Los Angeles, California; that the Commissioner of Internal Revenue on August 20, 1928

mailed to the petitioner a notice of deficiency showing deficiencies as above stated; that in the said notice of deficiency the Commissioner of Internal Revenue erred in determining that the said declaration of trust created an "association" within the meaning of Section 2 of the Revenue Acts of 1924 and 1926, and as a result thereof the Commissioner determined the net income and computed the tax in the manner and at the rates set forth in Part 2 of the said Revenue Acts, whereas in law and fact the declaration of trust did not create such an "association" but appointed the petitioners trustees of a "trust" within the meaning of Section 219 of the said Revenue Acts of 1921 and 1924, the net income of which should be determined and the tax computed as prescribed in Part 1 of said Revenue Acts; that in addition to the above assignment of error and as an independent and affirmative allegation, the petitioners allege that the said declaration of trust, in so far as it provides that income shall be held and accumulated is in contravention of the laws of the State of California, and that the laws of the said State require the petitioners to make immediate distribution of all income received, and that pursuant to the provisions of the said laws of California the petitioners should have filed fiduciary returns only on behalf of the trust and not on returns of income; and that the said Commissioner of Internal Revenue in his determination of tax for the said years committed certain other errors not [50] here material.

2. That thereafter and on November 30, 1928 the Commissioner of Internal Revenue filed with the said Board his answer to the said petition and therein admitted that the said T. A. Morrissey and James M. O'Brien are trustees of an express trust known as Western Avenue Golf Club with office and principal place of business at 824 I. N. Van Nuys Building, Los Angeles, California; and that the tax in controversy is that for the years 1924, 1925 and 1926 in the respective amounts of $3,567.16, $3,240.91 and $1,710.05; and therein denied that the Commissioner of Internal Revenue committed any error in his determination of the said deficiency.

3. That on October 17, 1929 the petitioners moved to amend the said petition as to matters not here important, which said motion was granted October 21, 1929 and to which the said amended petition the Commissioner of Internal Revenue filed his answer October 21, 1929.

4. The cause being at issue under the rules of practice of the said Board on the filing of the said answer to the original petition and on the filing of the said answer to the amended petition duly came on for hearing before a member of the Board at Los Angeles, California, on June 10, 1932, at which time the parties agreed to a stipulation of facts, and in addition thereto the petitioners by competent witnesses offered testimony in support of the allegations in their petition as aforesaid, and the cause was argued and submitted whereupon the Board on March 24, 1933 rendered its findings of fact and opinion and therein held that the said declara- [51]

tion of trust created an association within the meaning of the said provisions of the said Revenue Acts of 1924 and 1926, and further said that the said declaration of trust did not violate the said laws of California as to accumulation of income. On June 23, 1933 the said Board entered its decision redetermining the deficiency as above stated.

ASSIGNMENT OF ERROR.

1. The said Board erred in entering judgment for the Commissioner of Internal Revenue for each of the said years.

2. The said Board erred in redetermining the said deficiencies for the said years.

3. The said Board erred in holding as a matter of law that the said declaration of trust created an "association" within the meaning of Section 2 of the Revenue Acts of 1924 and 1926, and in determining the net income and computing the tax in the manner and at the rate set forth in Part II of the said Revenue Acts relating to corporations.

4. The said Board erred in not holding that the said declaration of trust created a "trust" within the meaning of Section 219 of the said Revenue Acts of 1924 and 1926, and that the income should be determined and the tax computed as prescribed in Part I of the said Revenue Acts as the income of an individual.

5. The said Board erred in holding that the said declaration of trust, in so far as it provides that income shall be held and accumulated, is not in contravention of the laws of the State of California and void and of no effect.

6. The said Board erred in not holding that, in so far [52] as the said declaration of trust provides that income shall be held and accumulated, it is in contravention of the laws of the State of California, which require the petitioners to make immediate distribution of the said income and accumulation to the beneficiaries of the trust and under which said declaration of trust as affected by the said laws of the State of California the petitioners are required to file a return as a "trust" within the meaning of Section 219 of the said Revenue Acts of 1924 and 1926.

7. The decision of the said Board that the petitioners are taxable as an association is contrary to the evidence and is without evidence to support it.

WHEREFORE, the petitioners pray that this Honorable Court may review the opinion and decision of the Board and reverse and set aside the same and determine that no deficiencies in tax is due or owing by the petitioners in respect to the years 1924, 1925 and 1926; and that the Clerk of the United States Board of Tax Appeals shall be directed to certify, and transmit and deliver to the Clerk of this Honorable Court copies of all and every of the documents necessary and material to the presentation and consideration of this petition for review as required by the rules of this Honorable Court and the pertinent statutory provisions.

THEODORE B. BENSON,
917 Southern Building,
Washington, D. C.,
Counsel for Petitioners. [53]

District of Columbia—ss.

Theodore B. Benson, being duly sworn, on oath deposes and says that he is the attorney for T. A. Morrissey and James M. O'Brien, the petitioners above named; that he is duly authorized by said petitioners to verify the foregoing petition on their behalf; that he has read the foregoing petition and is familiar with the statements therein; and that the facts stated therein are true.

THEODORE B. BENSON.

Subscribed and sworn to before me this 22nd day of September, 1933.

CHARLES E. FOSTER, JR.
Notary Public, D. C.

[Endorsed]: United States Board of Tax Appeals. Filed, Sept. 23, 1933. [54]

NOTICE.

To E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue, Counsel for Respondent.

You are hereby notified that on the 23rd day of September, 1933, a petition for review of the decision of the Board of Tax Appeals was filed with the Clerk in the case of T. A. Morrissey and James M. O'Brien, Trustees of an express trust, known as Western Avenue Golf Club v. Commissioner of Internal Revenue, Docket No. 40977, and a true copy of said petition is herewith served upon you.

THEODORE B. BENSON,
917 Southern Building,
Washington, D. C.,
Counsel for Petitioners.

Receipt of the above petition is hereby acknowledged this 23rd day of September, 1933.

E. BARRETT PRETTYMAN,
General Counsel,
Bureau of Internal Revenue,
Counsel for Respondent.

[Endorsed]: United States Board of Tax Appeals. Filed Sept. 23, 1933. [55]

[Title of Court and Cause.]

PRAECIPE FOR RECORD.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Ninth Circuit, heretofore filed by the Petitioner:

1. Docket entries of the proceedings before the Board.
2. Pleadings before the Board,
   (a) The original petition.
   (b) The answer to the original petition.
   (c) Motion to amend petition and amendments to petition and order granting same.
   (d) Answer to amended petition.
3. Memorandum opinion of the Board. [56]
4. Decision of the Board.

5. Petition for review.
6. Stipulation of facts.
7. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.
8. This praecipe.

THEODORE B. BENSON,
Attorney for Petitioner.

Service of a copy of the within praecipe is hereby admitted this 16th day of November, 1933.

E. BARRETT PRETTYMAN,
General Counsel,
Bureau of Internal Revenue.

[Endorsed]: United States Board of Tax Appeals. Filed Nov. 16, 1933. [57]

[Title of Court and Cause.]

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 57, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 18th day of December, 1933.

[Seal] B. D. GAMBLE,
Clerk,
United States Board of Tax Appeals. [58]

[Endorsed:] No. 7364. United States Circuit Court of Appeals for the Ninth Circuit. T. A. Morrissey and James M. O'Brien, Trustees of an Express Trust, known as Western Avenue Golf Club, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed January 2, 1934.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7364

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

T. A. MORRISSEY and JAMES M. O'BRIEN, Trustees of an Express Trust, Known as Western Avenue Golf Club,

Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

Upon Petition to Review an Order of the United States Board of Tax Appeals.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated Term, to wit, the October Term, A. D. 1934 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Tuesday the twenty-third day of October in the year of our Lord One Thousand Nine Hundred and thirty-four.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable FRANCIS A. GARRECHT, Circuit Judge.

[Title of Cause.]

ORDER OF SUBMISSION.

ORDERED petition to review in above cause argued by Mr. Carlton Fox, Special Assistant to the Attorney General, counsel for respondent, and submitted on brief on file on behalf of petitioners, and submitted to the court for consideration and decision.

At a stated Term, to wit, the October Term, A. D. 1934 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday, the seventh day of January in the year of our Lord One Thousand Nine Hundred and thirty-five.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable FRANCIS A. GARRECHT, Circuit Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT.

By direction of the court, ORDERED that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION.

Upon Petition to Review an Order of the United States Board of Tax Appeals.

Before: WILBUR and GARRECHT, Circuit Judges.

GARRECHT, Circuit Judge:

This petition for review involves deficiencies for income taxes in the sum of $1,890.55 for the year 1924, $1,623.49 for the year 1925 and $1,036.90 for the year 1926, and is taken from a decision of The Board of Tax Appeals. The question presented is whether or not the trust operated by the trustee petitioners was an "association" within the meaning of Section 2 [a] [2] of the Revenue Acts of 1924 and 1926.

Briefly stated, the facts are that on October 4, 1921, T. A. Morrissey and James M. O'Brien executed a declaration of trust to certain real estate in the city of Los Angeles, consisting of 155 acres of land, about one-third of which was subdivided into lots in 1921 and 1922, and which were all sold during said years. Such sales were apparently made on the installment basis, and were so treated by the Commissioner in determining the petitioners' income for the years 1923 to 1926, inclusive. On that portion of the tract not subdivided into lots the petitioner in 1922 constructed a golf course, which it thereafter operated until January 12, 1924. In the

meantime, however, in July 1923 petitioner sold the club to a corporation in exchange for all its capital stock and thereafter petitioners operated the same under a lease from said corporation. During 1924, 1925 and 1926 the petitioners received the sums of $53,560.65, $21,973.60 and $21,973.60, respectively, as dividends upon the said stock, all of which were returned as income by petitioners for the years in which they were received. Respondent, in his determination of the tax liability of petitioners eliminated said dividends from the taxable income of petitioners, for the years in which said dividends were so received, treating such dividends as nontaxable against petitioners as an association. The Board determined the petitioners to be an association for the years 1924, 1925 and 1926, and assessed taxes as above stated.

The trust instrument, among other things, authorized the trustees to take and hold not only the property in question, but any and all other property, real, personal or mixed which might thereafter be conveyed or transferred to or acquired by them, and in separate paragraphs from a to z the trust instrument authorized the trustees to engage in all manner of business activities. The instrument further provides that during the continuation of the trust the beneficial interest therein shall be solely evidenced by certificates or shares; that certificates for several thousand shares, at the par value of $100, were issued; that between 1922 and 1926 the number of interest holders varied from 275 to 920.

Exclusive management was vested in the trustees, the shareholders' interest being to receive dividends as declared.

The activities of the petitioners, according to the stipulation of facts, during the years 1924, 1925 and 1926 were confined to

> "* * * (1) Operation of said golf course for the first 12 days of 1924 as aforesaid; (2) Receipt from collection agent bank of principal and interest so collected by said bank in behalf of petitioner; (3) Receipt of credit of interest earned on bank balances; (4) Receipt of assignment fees in assignment of lot-purchase contracts by holders thereof; (5) Conveyance of lots to purchasers thereof; (6) Receeipt of dividends from Western Avenue Golf Club, Inc., upon shares thereof owned by petitioner; (7) Distribution of moneys to holders of beneficial interests in petitioner trust by way of dividends and, in some cases, by way of redemption and retirement of their beneficial interests. * * *"

Section 2 [a] [2] of the Revenue Act of 1924, which is applicable to the tax for the year 1924, and the same numbered section of the Revenue Act of 1926, which is applicable for tax for the years 1925 and 1926, are identical, and each act reads as follows: "The term 'corporation' includes associations joint stock companies and insurance companies."

The question for this court to determine is whether the petitioners' trust was an association, taxable as a corporation for the taxable years in question, as determined by respondent, and as found by the Board, or a strict trust, as contended by the petitioners.

The petitioners contend that the declaration of trust under which they are trustees did not create an association within the meaning of the term as used in the several Revenue Acts. They argue that they were not engaged in business; that the element of "doing business" was neither relevant or a controlling factor in the determination of whether a trust is taxable as an association; that there was no such beneficiary control as was necessary to classify petitioners as an association.

The contention of petitioners, that the trust was not engaged in business in the tax years here in question, because its activities in those years had been reduced to the collection of installments and dividends, to the necessary conveying of property previously sold, and the like, is answered to the contrary by the decision of this court in the case of Sloan v. Commissioner, 63 F. (2d) 666 [C. C. A. 9].

As to the contention that "doing business" is not controlling or relevant, this court in Twin Bell Oil Syndicate v. Helvering, 70 F. (2d) 402 [C. C. A. 9], after quoting from its opinion in the Trust No. 5833, Security First National Bank v. Welch, 54 F. (2d) 323 [C. C. A. 9], said at page 407:

"There is ample additional authority for the proposition that the 'business' test is now paramount."

Concerning petitioners' contention that the trust in question here is not an association because there is no beneficiary control, it may be said that on a misconception of Crocker v. Malley, 249 U. S. 223, the Treasury Department promulgated regulations providing that beneficiary control was a prerequisite for holding a trust to be a corporation. However, since the decision in Hecht v. Malley, 265 U. S. 144, the Department changed its regulations and rulings, making proof of beneficiary control unnecessary. Congress thereafter recognized and validated this change in the ruling by Section 704(a) of the Revenue Act of 1928, the force of such change being pointed out in Sloan v. Commissioner (supra), and Trust No. 5833, Security First National Bank v. Welch (supra). It is now well settled that beneficiary control is not a requisite to the taxability of a trust as a corporation. Twin Bell Oil Syn. v. Helvering (supra).

Petitioners further contend that Section 704(b) of the Revenue Act of 1928 is unconstitutional as an arbitrary exclusion of petitioners from the benefit of said sub-section, because it has two trustees instead of having a single trustee. There is no merit in this contention. This law provides that besides having but a single trustee the trust must be

"* * * created and operated for the sole purpose of liquidating real property as a single

venture (with such powers of administration as are incidental thereto, including the acquisition, improvement, conservation, division, and sale of such property), distributing the proceeds therefrom in due course to or for the benefit of the beneficiaries, and discharging indebtedness secured by the trust property * * *".

As under the facts found and the determination thereof the trust here in question is not a liquidating trust, and thus in any event petitioners would not be entitled to the benefit of said section.

The decision of the Board of Tax Appeals is affirmed.

(Endorsed): Opinion. Filed Jan. 7, 1935. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 7364

T. A. MORRISSEY and JAMES M. O'BRIEN; Trustees of an Express Trust, known as Western Avenue Golf Club,

Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

JUDGMENT.

Upon Petition to Review an Order of the United States Board of Tax Appeals.

This Cause came on to be heard on the Transcript of the Record from the United States Board of Tax Appeals and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the Order of the said Board of Tax Appeals in this Cause be, and hereby is affirmed.

[Endorsed]: Filed and entered Jan. 7, 1935. Paul P. O'Brien, Clerk.

At a stated Term, to wit, the October Term, A. D. 1935 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Friday the first day of March in the year of our Lord One Thousand Nine Hundred and thirty-five.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable FRANCIS A. GARRECHT, Circuit Judge.

[Title of Cause.]

ORDER DENYING PETITION FOR A REHEARING.

Upon consideration thereof, and by direction of the court, IT IS ORDERED that the petition of petitioners, filed February 5, 1935, for a rehearing of above cause be, and hereby is denied.

[Title of Court and Cause.]

ORDER STAYING ISSUANCE OF MANDATE.

Upon application of Theodore B. Benson counsel for the Petitioners, and good cause therefor appearing, IT IS ORDERED that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including April 1, 1935; and in the event the petition for a writ of certiorari to be made by the counsel for petitioners herein be docketed in the Clerk's office

of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

CURTIS D. WILBUR,
Senior United States Circuit Judge.

Dated: San Francisco, California,
March 1, 1935

[Endorsed]: Filed Mar. 1, 1935. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, PAUL P. O'BRIEN, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing seventy-five (75) pages, numbered from and including 1 to and including 75, together with supplemental transcript of record consisting of 40 pages, numbered from and including 1 to and including 40, to be a full, true and correct copy of the entire record, of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the petitioners and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 16th day of March, A. D. 1935.

[Seal] PAUL P. O'BRIEN,
Clerk